IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER and RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONERS' REPLY BRIEF

CHARLES F. LUCE
Attorney for the Petitioners
1002 N. E. Holladay Street
Portland 8, Oregon

INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER and RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONERS' REPLY BRIEF

Argument

Respondent states the question to be the validity of the rules of Washington governing appeals *in forma pauperis* set forth in *In re Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45 (Br., p. 8). We agree that the validity of these rules, *as applied in this case*, is a question for decision by the Court. But we point out that in the application of these rules the respondent and the trial court seemingly overlooked important parts of them. Section 2 of the rules requires that, "If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony," it either specify to the trial court the

portion it thinks will be adequate or show that a narrative statement will be adequate and available to the defendant (54 Wash. 2d at 44-45). The record fails to show that the state took any cognizance of this portion of the rules. Section 3 of the rules requires that, "The trial court in disposing of an indigent's motion for a statement of facts shall enter findings of fact upon * * * (c) whether a narrative form of statement of facts will be adequate . . . and . . . available to the defendant; and, if not (d) what portion of the stenographic transcript will be necessary to effectuate the indigent's appeal" (54 Wash. 2d at 45). The trial court did not make such findings of fact (R. 23-31).

In its brief, respondent seeks to excuse the trial court's omission by the assertion that one of the petitioners, Mr. Draper, "made it clear . . . that he would not accept a narrative statement of facts," etc. (Br., p. 21). But Mr. Draper was speaking only for himself, not for the petitioner Mr. Lorentzen (R. 34). Further, we cannot read Mr. Draper's argument that he needed a full transcript as a waiver of his right to anything less than a full transcript (Br., pp. 21-23; R. 39-45). Although we believe it would not have been adequate, the trial court could have made a more meaningful record for the petitioners' appeals if, as a minimum, it had requested the court reporter to transcribe each of the state's offerings of proof which were allowed over petitioners' objections.

Respondents argue, also, that petitioners should be denied the right of appeal because they did not specify in sufficient detail the errors which they claim were committed by the trial court (Br., pp. 19-28). The record shows, we believe, that petitioners specified these errors as well as they could in the absence of a transcript (R. 10-13, 35-45). If indigent appellants in order to obtain the same right of appeal as moneyed appellants must recall with particularity each error committed in the course of trial, they

indeed have been denied Equal Protection of the Law. Not even experienced counsel could perform such a feat of memory unless he were blessed with total recall. The need for a complete transcript to enable counsel to evaluate a possible appeal has been well described by Mr. Bennett Boskey,

> "Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen—let alone assessed—without reading an accurate transcript. Particularly is this true of questions relating to evidence or to the judge's charge; and it may also apply to many other types of questions. Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible 'plain error,' even though trial counsel was not aware of their existence; and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal. In short, a conscientious counsel freshly entering the case at the appellate stage normally is likely to conclude that a full or partial transcript of the trial proceedings will be indispensable if the requisite 'dependable record' is to be obtained as a basis for evaluating the case." Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 793 (1961).

Respondent's argument in defense of the rules of Washington restricting appeals by indigents rests mainly on its Point II, which asserts,

> "The Washington case of In re Woods v. Rhay equates a monied defendant and an indigent defendant with respect to the restrictions on the preparation of a transcript for the purposes of appeal" (Br., p. 13).

In more detail, respondent's argument runs thus: "If the appeal would be a useless thing, obviously the rich man will not appeal." He does not wish "to throw good money after bad" (Br., p. 14). A poor person "has no such monetary restriction upon his decision to prosecute an appeal" (Br., p. 14). It is necessary, therefore, that the State of Washington place special restrictions on poor persons' appeals to screen out those which are "frivolous" (Br., p. 15). The rules announced by the Supreme Court of Washington in *Woods* v. *Rhay* accomplish this purpose in a fair and reasonable way (Br., p. 15). The argument, if accepted, would resolve an important constitutional issue by a speculation in psychology.

We cannot believe that an ordinary man, sentenced to a term in the penitentiary, would decide not to appeal because he wished to save the price of a transcript. Our observation has been that such a man would base his decision principally upon considerations having nothing to do with his pocketbook: the advice of his counsel, his own feelings of guilt or innocence, his desire "to get it over with," his expectations as to the prosecutor's and the trial judge's recommendations to the parole board, the expected attitude of the parole board itself, his age, his health, etc. It is true, of course, there will be exceptional defendants who base decisions to appeal or not to appeal on other considerations, sometimes unworthy considerations. But psychological speculation aside, it would violate the philosophy of the Bill of Rights and the Fourteenth Amendment if this Court were to fashion rules solely for the purpose of preventing the abuse of constitutional guarantees by unscrupulous persons. See *Feldman* v. *United States Oil and Ref. Co.*, 322 U.S. 487 (1944), dissenting opinion of Mr. Justice Black concurred in by Mr. Justice Douglas and Mr. Justice Rutledge, at 494, especially 500-503.

This Court, we believe, disposed of respondent's main argument in *Coppedge* v. *United States*, when it observed,

> "• • • Statistics compiled in the court below illustrate the undeniable fact that as many meritorious criminal cases come before that court through applications for leave to proceed in forma pauperis as on the paid docket, and that a priori justification can be found for considering them, as a class, to be more frivolous than those in which costs have been paid. Even-handed administration of the criminal law demands that these cases be given no less consideration than others on the courts' dockets. • • •." 369 U.S. 438 at 449.

Respondent's attempt to justify the Washington rules by reference to Mr. Justice Frankfurter's concurring opinion in *Griffin* v. *Illinois*, 351 U.S. 12, 24 (1956), misinterprets, we believe, what Mr. Justice Frankfurter had in mind (Br., p. 10). When Mr. Justice Frankfurter spoke of "the growing experience of reforms in appellate procedure" and of "economic modes for securing review still to be devised," we do not believe he was thinking of rules directed solely to reducing the volume of appeals from felony convictions of poor persons. Rather, he was speaking generally of reforms intended to weed out unmeritorious appeals, whether by the rich or the poor. The rules of Washington seek only to reduce the number of appeals by the indigent. The state allows the well-to-do to appeal without limitation except their own "sense of thrift" (Br., p. 15). Such an approach to the problem of screening ill-advised appeals does not square with Equal Protection of the Laws or Due Process of Law.

Respectfully submitted,

CHARLES F. LUCE
Attorney

January 1963